

On the terms "human rights", "fundamental rights" and "constitutional rights"

The term *human rights* stands pre-eminently for a philosophical concept that originates in the philosophy of the Enlightenment. Human rights are the "natural rights" of every human being deriving from *natural law*. They are considered pre-legal - they existed before the state. The state can neither create nor abolish nor regulate them but must respect and safeguard them. The *national constitution cannot grant human rights but only guarantee their respect and safeguard*. For this reason, most advanced constitutions do not use the term "human rights" except in the preamble and in order to express the general commitment to the idea.

The common way to legally implement the philosophical concept of human rights is to create corresponding particular *legal positions* within the national legal order, which are called *fundamental rights* (or, sometimes, "basic rights"). They are not identical to the human rights. They are created, shaped and granted by the state, can be repealed and are different in every state. But they are the rights that *can be handled by the lawyers*. If they are granted in the constitution, they are also called *constitutional rights*.

When human rights are guaranteed in *international treaties*, they are still called "human rights". However, in this case, the words represent a legal term. Like the fundamental rights, these "human rights" are not the natural, pre-legal rights of the human being but artificial rights. They have been created and organised by the treaties and show many similarities to the fundamental rights guaranteed in the constitutions. However, they usually pretend to be just a *mirror of the natural rights* and therefore are called like them. Usually the standards of the fundamental rights in the national constitutions are higher.

Some constitutions (e.g. the Constitution of the Republic of Indonesia of 1945) call the fundamental rights guaranteed in the constitution "human rights". This may provoke misunderstandings, since in reality they still are fundamental rights. A constitution cannot grant human rights but only fundamental rights. The political-philosophical concepts on the "natural", pre-legal human rights do not apply to these rights that have been shaped by the law. When working with these rights, please bear the risk of misunderstandings in mind!

More information on this course contribution at www.thomas-schmitz-yogyakarta.id. For any questions, suggestions and criticism please contact me via e-mail (tschmit1@gwdg.de) or WhatsApp (+62 852 1402 9884).